IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned On Briefs November 16, 2009

# TERESA MALEK, ET AL. v. VIRGINIA BRANUM GUNTER, ET AL.

**Direct Appeal from the Chancery Court for Pickett County**
**No. 2087 Ronald Thurman, Chancellor**

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**No. M2009-00059-COA-R3-CV - Filed December 16, 2009**

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This case involves a family dispute over real property. The Appellee, Executrix of the estate of the deceased patriarch, seeks to set aside a warranty deed executed by the decedent in favor of decedent's daughter, the Appellant herein. Because the Appellant held her father's power of attorney, and exercised it, the trial court found that a confidential relationship existed, which gave rise to a presumption of undue influence on the part of Appellant. Based upon its finding that Appellant failed to meet her burden to rebut, by clear and convincing evidence, the presumption of undue influence, the trial court set aside the deed. We affirm.

**Tenn. R. App. P. 3. Appeal as of Right; Judgment of the Chancery Court is Affirmed**

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and DAVID R. FARMER, J., joined.

C. Douglas Fields, Crossville, Tennessee, for the Appellant, Virginia Branum Gunter.

S.N. Garrett, Jamestown, Tennessee, for the Appellee, Teresa Malek.

Michael Savage, Livingston, Tennessee, for the Appellees, Michael Branum and Lahoma Branum.

## OPINION

On March 11, 1997, Samuel C. Brannum ("the Decedent") executed an unrestricted

Durable Power of Attorney, naming his daughter, Appellant Virginia Brannum Gunter, as his attorney-in-fact.[1] On September 2, 2003, the Decedent executed another unrestricted Durable Power of Attorney, which also names Ms. Gunter as his attorney-in-fact.

In early October 2003, Ms. Gunter endorsed a check dated October 8, 2003, and made payable to the Decedent by signing both her name and the Decedent's. There is no indication that Ms. Gunter received any benefit from this transaction but, as discussed *infra*, it does indicate that she used the power of attorney granted by her father.

By General Warranty Deed dated October 17, 2003, the Decedent conveyed the real property, which is the subject of the present appeal, to Ms. Gunter. The deed was prepared by the Decedent's attorney, Tom Coleman. According to Mr. Coleman's testimony, the Decedent's son and daughter-in-law, Appellees Michael and Lahoma Brannum(the "Brannums"), had sued the Decedent concerning approximately four acres of land that adjoins the property conveyed to Ms. Gunter. The Brannums' lawsuit is not the subject of the present appeal, and we will not tax the length of this opinion by inclusion of the specifics of that case. The lawsuit brought by the Brannums affects the present case only to the extent that the Decedent feared that his son would attempt to take the subject property, or to place a lien on it.

At the time of the execution of the October 17, 2003 deed to Ms. Gunter, the Decedent was living with Ms. Gunter due to his myriad health issues, which included chronic lung disease, acute bronchitis, generalized anxiety disorder, and arthritis. The record indicates that, from July 2003 to November 2003, the Decedent's health steadily declined. At some point after the execution of the subject deed, the Decedent and Ms. Gunter had a falling out (although the specific of this falling out are not in record). At any rate, the Decedent asked his grandson to drive him to Georgia to stay with relatives there. The Decedent remained in Georgia until his death.

On September 9, 2005,the Decedent filed suit against Ms. Gunter in the Chancery Court for Pickett County. By his Complaint, the Decedent sought to set aside the October 17, 2003 conveyance made to Ms. Gunter. As grounds, the Decedent states that he "was tricked into conveying the subject property to [Ms. Gunter] because of the trust relationship that existed ...[and that Ms. Gunter had] breached this trust relationship [by] undue influence and breach of confidence." Ms. Gunter answered the complaint, denying the material allegations therein.

The Decedent died on January 2, 2006, while his lawsuit was pending. Pursuant to Tenn. R. Civ. P. 25.01(1), Ms. Gunter filed a suggestion of death. By Order of February 22, 2006, Teresa Malek, Executrix of the Estate of Samuel C. Brannum, was substituted as plaintiff for the Decedent. By Order of May 17, 2007, the Brannums were allowed to intervene as plaintiffs pursuant to Tenn. R. Civ. P. 24.01. By Order of May 23, 2007, the trial court granted Ms. Gunter's motion to add Gary Moles as a party-defendant based upon the fact that Ms. Gunter had sold certain property, which is

[1] There is some confusion in the record as to the spelling of "Brannum." Some documents use "Branum;" however, for purposes of this appeal, we will adopt the spelling that was used in the original Complaint.

the subject of the litigation, to Mr. Moles. Mr. Moles was subsequently granted summary judgment by order entered on September 23, 2008.[2] Ms. Gunter's motion for summary judgment was denied, and the matter proceeded to trial on November 8, 2008. Following that hearing, on December 8, 2008, the court entered an Order, which states, in relevant part, as follows:

> 1. That at the beginning of the trial of this matter it was stipulated by...Virginia Brannum Gunter, that Samuel C. Brannum executed an unrestricted power of attorney on the 2nd day of September, 2003, naming...Virginia Brannum Gunter as his attorney in fact.
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> 2. That at the beginning of trial it was further stipulated by...Virginia Brannum Gunter that she endorsed a check dated October 8, 2003 and made payable to Samuel C. Brannum by signing both her name and the name of Samuel C. Brannum and that said check was endorsed before the 17th day of October, 2003....
>
> 3. That Virginia Brannum Gunter's aforementioned endorsement of the check was use/exercise of the aforementioned unrestricted power of attorney.
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> 4. That pursuant to Childress v. Currie, et al, 74 S.W.3d 324 (Tenn. 2002), and Parish et al. v. Kemp et al., 179 S.W.3d 524 (Tenn. Ct. App. 2005), a confidential relationship existed between...Virginia Brannum Gunter and Samuel C. Brannum, on the date of the deed, which is the subject of this lawsuit....
>
> 5. That the Court finds, as a matter of law, that since a confidential relationship existed between Virginia Brannum Gunter and Samuel C. Brannum a presumption of undue influence arises as Virginia Brannum Gunter was the dominant party and received a benefit from Samuel C. Brannum.
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> 6. That the Court finds as a matter of law that the burden shifted to Virginia Brannum Gunter to rebut the presumption of undue influence by proving the fairness of the transaction by clear and convincing evidence.

[2] No issue has been raised concerning the grant of summary judgment to Mr. Moles, and he is not a party to this appeal.

7. That...Virginia Brannum Gunter has not proven the fairness of the transaction by clear and convincing evidence.

8. That the Warranty Deed executed by Samuel C. Brannum on the 17th day of October, 2003, purporting to convey the real property, which is the subject of this suit, to Virginia Brannum Gunter...is declared null and void, as it was obtained due to undue influence exerted on Samuel C. Brannum by Virginia Brannum Gunter.

9. That the real property...is and shall be the property of the estate of Samuel C. Brannum.

Ms. Gunter appeals and raises five issues for review as stated in her brief:

I. Whether the court erred in finding undue influence?

II. Whether any presumption created in this case of undue influence was rebutted by clear and convincing evidence?

III. Whether Plaintiff's claim was barred by the doctrine of unclean hands?

IV. Whether the trial court erred in precluding [Ms. Gunter] from testifying pursuant to the Dead Man's Act?

V. Whether the Plaintiff ratified the transfer to [Ms. Gunter]?

Because this case was tried by the court sitting without a jury, we review the case ***de novo*** upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. ***See*** Tenn. R. App. P. 13(d). Furthermore, when the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to observe the witnesses and their manner and demeanor while testifying is in a far better position than this Court to decide those issues. ***See McCaleb v. Saturn Corp***., 910 S.W.2d 412, 415 (Tenn.1995); **Whitaker v.** ***Whitaker***, 957 S.W.2d 834, 837 (Tenn. Ct. App.1997). The weight, faith, and credit to be given to any witness' testimony lies, in the first instance, with the trier of fact, and the credibility accorded will be given great weight by the appellate court. ***See id.***; ***see also Walton v. Young***, 950 S.W.2d 956, 959 (Tenn.1997). That being said, when evidence is presented through a deposition, the appellate courts are just as able to judge the witness's credibility as the trial court. ***Board of Professional Responsibility v. Curry***, 266 S.W.3d 379 (Tenn. 2008).

**Dead Man's Statute**

We will first address the issue concerning whether the trial court erred in not allowing Ms. Gunter to testify in this case. Prior to the hearing, Ms. Gunter gave two depositions–one on May 5, 2006, the other on June 18, 2008. At the hearing, Ms. Gunter's attorney attempted to call her as a witness over the objection of opposing counsel. The trial court sustained the objection on grounds that Ms. Gunter's testimony is precluded under the Dead man's statute, Tenn. Code Ann. §24-1-203. Following the objection, Ms. Gunter's attorney made an offer of proof of the two depositions, which were marked and are contained in the appellate record. On appeal, Ms. Gunter asserts that the trial court erred in disallowing her testimony, especially in light of the fact that she had previously given testimony in the form of discovery depositions.

The Dead man's statute provides, in relevant part, that:

> In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party....

The purpose of the Dead man's statute is to protect estates from spurious claims. ***In re Estate of Marks***, 187 S.W.3d 21, 28 (Tenn. Ct. App.2005), perm. app. denied (Tenn. Feb. 21, 2006) (relying upon ***Morfin v. Estate of Martinez***, 831 N.E.2d 791, 798 (Ind. Ct. App.2005)). It is based on the common-law principle that an interested party will be powerfully tempted to misrepresent transactions or communications with a deceased person who cannot rebut the party's testimony. ***Id.*** (relying on ***Schimpf v. Gerald, Inc***., 52 F. Supp.2d 976, 987 (E .D. Wis.1999)). Accordingly, the Dead man's statute prevents interested parties from giving self-serving testimony regarding conversations or transactions with the deceased when the testimony involves transactions or statements that would either increase or decrease the deceased's estate. ***Cantrell v. Estate of Cantrell***, 19 S.W.3d 842, 846 (Tenn. Ct. App.1999). As discussed by this Court in ***Bernard v. Reaves***, 178 S.W.2d 224 (Tenn. Ct. App.1943), the Dead man's statute "contemplates those cases wherein judgment may be rendered for the representative party and against the proposed witness, or vice versa. It does not comprehend a case wherein no judgment could be rendered for or against the one called upon the testify, even though a judgment might be rendered for or against the personal representative." ***Id.*** at 228. It has been said that the purpose of the statute is "to prevent the surviving party from having the benefit of his own testimony, when, by the death of his adversary, his representative was deprived of his executor's version of the transaction or statement." ***McDonald v. Allen***, 67 Tenn. 446, 448 (1874). Because the statute may operate to exclude accurate evidence, it is "strictly construed as against the exclusion of the testimony and in favor of its admission." ***Haynes v. Cumberland Builders, Inc***., 546 S.W.2d 228, 231 (Tenn. Ct. App.1976). Thus, we must interpret the statute literally. ***See id.*** at 230-31; Neil P. Cohen, Sarah Y. Sheppeard & Donald F. Paine, Tennessee Law of Evidence § 6.01[5][c] (5th ed.2005).

Here, the lawsuit is brought by the executrix of the Decedent's estate; consequently, testimony by either party concerning any transaction with, or statement by, the Decedent is barred

under Tenn. Code Ann. §24-1-203. However, in her brief, Ms. Gunter contends that the fact that Plaintiffs took her deposition testimony creates an exception to the Dead man's statute. We disagree. Ms. Gunter has cited no case law to support her position, stating only that:

> There seem to be cases that indicate that the [Dead man's] statute makes the witness incompetent, but swearing the witness in, and soliciting her sworn testimony waived the incompetency....

We can find no cases to support Ms. Gunter's position. Rather, Tenn. R. Civ. P. 32.03 provides:

> **Effect of Taking or Using Depositions**. — A party does not make a person the party's own witness for any purpose by taking the person's deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under Rule 32.01(2). At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by that party or by any other party.

Based upon the plain language of Tenn. R. Civ. P. 32.03, we cannot agree with Ms. Gunter that the existence and proffer of her deposition testimony lifts the disability created by the Dead man's statute. However, it is well settled that the Dead man's statute cannot be extended by the courts to cases not within its terms upon the idea that they fall within the evil which was intended to be guarded against. ***Rielly v. English***, 77 Tenn. 16 (1882), ***Hughlett v. Conner***, 59 Tenn. 83 (1873). This is the reason that the statute must be strictly construed against the exclusion of the testimony and in favor of its admission, ***Hughlett v. Conner***, 59 Tenn. 83, 12 Heisk. 83, 1873 WL 3747 (1873). To that end, there are two criteria that must be met in order to bring a case within the operation of the statute and authorize the rejection of the evidence: (1) the proposed witness must be a party to the suit in such a way that judgment may be rendered for or against him; and (2) the subject matter of his or her testimony must concern some transaction with or statement by the testator or intestate. ***Montague v. Thomason***, 18 S.W. 264 (Tenn. 1892). While the first criterion is satisfied in the instant case, under the second ***Montague*** criterion, we are unable to say that every portion of Ms. Gunter's testimony was properly excluded because of her disability under the Dead man's statute. However, it is well settled that the erroneous exclusion of evidence does not require reversal on appeal unless this Court can determine that the admission of the evidence would have affected the outcome of the trial. ***Dossett v. City of Kingsport***, 258 S.W.3d 139, 145 (Tenn. Ct. App.2007). Fortunately, in this case, Ms. Gunter made an offer of proof in the trial court. The purpose of an offer of proof is to allow the party whose evidence has been excluded to preserve for appellate review the issue of whether the evidence should have been excluded. Tenn. R. Evid. 103(a)(2). As noted in ***Alley v. State***, 882 S.W.2d 810, 815-16 (Tenn. Crim. App.1994), "courts are required, in appropriate circumstances, to allow offers of proof when evidence is excluded so as to

enable consideration of the issue on appeal." After a thorough review of Ms. Gunter's deposition testimony, we conclude that the substantive evidence contained therein (i.e., evidence that would go to satisfy Ms. Gunter's burden of proof, *see* discussion below) would, in fact, be barred under the Dead man's statute, as it involves conversations and dealings directly with the Decedent. So, while we conclude that the trial court erred in excluding all of Ms. Gunter's testimony; from our review of the offer of proof, and in light of those portions thereof that conflict with the Dead man's statute, we find that this error was harmless. We now turn to the issue of whether the trial court erred in finding that a confidential relationship existed between Ms. Gunter and her father so as to create a presumption of undue influence in the procurement of the suspect deed, and, if so, whether Ms. Gunter has put forth sufficient proof to rebut that presumption.

**Undue Influence**

"The most common way of establishing the existence of undue influence is 'by proving the existence of suspicious circumstances warranting the conclusion that the [action] was not the [decedent's] free and independent act.'" ***Estate of Hamilton v. Morris***, 67 S.W.3d 786, 792 (Tenn. Ct. App.2001) (quoting ***Mitchell v. Smith***, 779 S.W.2d 384, 388 (Tenn.Ct.App.1989)). The most frequently used "suspicious" circumstances are: "(1) a confidential relationship between the testator and the beneficiary; (2) the testator's poor physical and mental condition; and (3) the beneficiary's involvement in the procurement of the [document] in question." ***Id.*** (citing ***Mitchell***, 779 S.W.2d at 388). However, other suspicious circumstances are also recognized: "(1) secrecy concerning the document's existence; (2) the testator's advanced age; (3) the lack of independent advice in preparing the document; (4) the testator's illiteracy or blindness; (5) the unjust or unnatural nature of the document's terms; (6) the testator being in an emotionally distraught state; (7) discrepancies between the document and the testator's expressed intentions; and (8) fraud or duress directed toward the testator." ***Id.*** at 792-93 (citing ***Mitchell***, 779 S.W.2d at 388).

Although there exists no prescribed number of suspicious circumstances that must be met in order to invalidate an action, "the doctrine of undue influence is applicable only where there is a confidential relationship [.]" ***In re Estate of Brevard***, 213 S .W.3d 298, 302 (Tenn. Ct. App.2006) (citing ***Keasler v. Estate of Keasler***, 973 S.W.2d 213, 219 (Tenn. Ct. App.1997)); ***see also Simmons v. Foster***, 622 S.W.2d 838, 840 (Tenn. Ct. App.1981). "Confidential relationships can assume a variety of forms, and thus the courts have been hesitant to define precisely what a confidential relationship is." ***Kelley v. Johns***, 96 S.W.3d 189, 197 (Tenn. Ct. App.2002) (citing ***Robinson v. Robinson***, 517 S.W.2d 202, 206 (Tenn. Ct. App.1974)). However, "[i]n general terms, it is any relationship that gives one person the ability to exercise dominion and control over another." ***Id***. (citing ***Givens v. Mullikin ex rel. Estate of McElwaney***, 75 S.W.3d 383, 410 (Tenn.2002)). It is well established in Tennessee that "a confidential relationship arises as a matter of law when an unrestricted power of attorney is granted to the dominant party." ***Childress v. Currie***, 74 S.W.3d 324, 328 (Tenn.2002). The execution of a power of attorney creates a legal confidential relationship and the holder of the power, characterized as the dominant party, serves in a fiduciary relationship to the grantor of the power, but only to the extent of the powers granted. ***See*** Tenn. Code Ann. § 34-6-107; ***Matlock v. Simpson***, 902 S.W.2d 384, 385 (Tenn.1995); ***see also In the Matter of Conservatorship***

***of Groves***, 109 S.W.3d 317, 351 (Tenn. Ct. App.2003)(citing ***Childress***, 74 S.W.3d at 329) ("a confidential relationship arises-through a fiduciary relationship-between a principal and attorney-in-fact to a power of attorney when the power of attorney has been exercised and the attorney-in-fact was active in its procurement").

Under well-settled Tennessee law, "the existence of a confidential or fiduciary relationship, together with a transaction by which the dominant party obtains a benefit from the other party, gives rise to a presumption of undue influence that may be rebutted." ***Matlock***, 902 S.W.2d at 385. Evidence may be introduced to rebut the presumption of undue influence. The weaker party's receipt of independent legal advice is one way of showing fairness. ***Richmond v. Christian***, 555 S.W.2d 105, 107-08 (Tenn.1977). In fact, proof of independent legal advice may be required in certain cases. ***Id***. at 108.[3] Otherwise, the court is to consider all of the evidence and apply "sound principles and good sense" in determining whether the transaction was fair. ***Childress***, 74 S.W.3d at 329. In cases in which a presumption of undue influence arises from the existence of a confidential relationship, a court may consider "a lack of suspicious circumstances as evidence to rebut an automatic legal presumption of undue influence." ***Parish v. Kemp***, No. W2007-02207-COA-R3-CV, 2008 WL 5191291, *6 (Tenn. Ct. App. Dec. 11, 2008) perm. app. denied (Tenn. June 15, 2009). The determination of whether the dominant party exerted undue influence is a question of fact. ***Waller v. Evans***, No. M2008-00312-COA-R3-CV, 2009 WL 723519, *9 (Tenn. Ct. App. March 17, 2009).

In this case, there is no question that a confidential relationship existed between Ms. Gunter and her father based upon the fact that Ms. Gunter held an unrestricted power of attorney. Moreover, the evidence is clear that Ms. Gunter exercised her power as the Decedent's attorney-in-fact by handling his business affairs and, in particular, in endorsing the October 8, 2003 check. As noted above, "the existence of a confidential or fiduciary relationship, together with a transaction by which the dominant party obtains a benefit from the other party [here, the procurement of the warranty deed], gives rise to a presumption of undue influence that may be rebutted." ***Matlock***, 902 S.W.2d at 385. The presumption of invalidity arising from a confidential relationship extends to all dealings between persons in fiduciary and confidential relations, and includes gifts, contracts and other transactions in which the dominant party obtains a benefit from the other party. ***See, e.g., Roberts v. Chase***, 166 S.W.2d 643, 651 (Tenn. Ct. App.1942). The question, then, is whether Ms. Gunter presented sufficient evidence to rebut the presumption of undue influence.

It is well settled that where "a presumption of undue influence arises, [that presumption] may be rebutted **only by clear and convincing evidence**." ***In re Wakefield***, No.

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[3] In ***Richmond***, the court noted:

> Independent advice is ordinarily required where it is a reasonable requirement and where the circumstances are such that it would be difficult to show the fairness of the transaction without proof of independent advice, particularly, where the donor is impoverished by the gift in question or the gift seems to be unnatural under the circumstances of the case.
>
> ***Richmond***, 555 S.W.2d at 108.

M1998-00921-COA-R3-CV, 2001 WL 1566117, * 14 (Tenn. Ct. App. Dec. 10, 2001), perm. app. denied (Tenn. July 1, 2002) (quoting ***Matlock v. Simpson***, 902 S.W.2d 384, 386 (Tenn.1995)) (emphasis added). Clear and convincing evidence "establishes that the truth of the facts asserted is highly probable ... and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence." ***In re M.J.B.***, 140 S.W.3d 643, 653 (Tenn. Ct. App.2004). Such evidence "produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established." ***Id***. at 653.

Turning to the evidence offered by Ms. Gunter (including, as discussed above, those portions of the depositions that we deem not excluded under the Dead man's statute), we first examine the question of whether the Decedent received independent advice concerning the transfer. Our Supreme Court has discussed what is meant by "independent advice," to wit:

> Proper independent advice in this connection means that the donor had the [preliminary] benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but who was furthermore so disassociated from the interests of the donee as to be in a position to advise with the donor impartially and confidently as to the consequences to himself his proposed benefactions.

***Turner v. Leathers***, 232 S.W.2d 269, 271 (Tenn. 1950) (quoting ***Post v. Hagan***, 71 N.J.Eq. 234, 243, 65 A. 1026, 1027, 124 Am.St.Rep. 997). Here, the May 5, 2006 deposition of Thomas Coleman, Jr., the family attorney, was submitted into evidence without objection. After review of Mr. Coleman's testimony, it is clear that the Decedent did not, in fact, receive independent advice pursuant to the above definition. The testimony clearly shows that, not only was Ms. Gunter present when the deed was prepared and delivered, but Ms. Gunter's friend, Rosetta Simpson, was also present. Prior to executing and delivering the deed to Ms. Gunter, there is no indication that the Decedent conferred privately with Mr. Coleman at any time concerning the transfer. Rather, it is clear that the decision to transfer the property to Ms. Gunter was the result of conversations with Mr. Coleman that included both Ms. Gunter and her father. From Mr. Coleman's testimony, we glean that, although the Decedent agreed to the transfer, he did not do so after independent advice, but rather as a result of many conversations that usually included Ms. Gunter. In fact, when asked the question: "Did it appear to you [Mr. Coleman] that Ms. Gunter had the decision making... power...about whether the property would be transferred," Mr. Coleman answered that "the control was in her [Ms. Gunter]." Consequently, Ms. Gunter has failed to meet her burden of proof to rebut the presumption of undue influence by evidence that the Decedent received independent advice.

Not only does Mr. Coleman's testimony indicate the lack of independent advice in this case, it also sheds light on the Decedent's state of mind at the time of the transfer. As briefly mentioned at the outset of this Opinion, the record indicates that, at the time of the transfer, the Decedent was concerned over a lawsuit filed by the Appellee Brannums. Although we can find no legal basis to support the Decedent's fear that the Brannums would be able to take the property that is the subject

of the present appeal, it is clear that somehow the Decedent had been convinced that this was a possibility. Mr. Coleman testified that the Decedent believed that "Michael was going to take the property and the purpose of the deed was to get the property out of Mr. Brannum's name." Mr. Coleman further testified that the reason for the deed from the Decedent to Ms. Gunter was "the fear expressed to me [Mr. Coleman] by everybody." Mr. Coleman went on to state:

> Q. So, did you [Mr. Coleman] convince Mr. Brannum and Ms. Gunter, or did they convince you that Michael was going to attempt to take the entire piece of property?
>
> A. I don't know, I guess in a sense they convinced me....

Ms. Gunter attempts to disparage Mr. Coleman's testimony by asserting that he had a conflict in this case. While we concede that there, in fact, appears to be a conflict of interest in Mr. Coleman's representing several members of the Brannum family who may have had competing interests, that finding does not negate Mr. Coleman's testimony concerning whether the Decedent received independent advice and/or his testimony concerning the Decedent's state of mind at the time of the execution of the deed. Moreover, from our review, it appears that Ms. Gunter failed to object to Mr. Coleman's testimony at the trial level. It is incumbent upon a party to take whatever action is reasonably available to prevent or nullify the harmful effects of an error. Tenn. R.App. P. 36(a). Having not specifically raised this issue at the trial level, Ms. Gunter cannot be heard to complain on appeal.

The record further indicates that the Decedent depended heavily upon Ms. Gunter, and that he was living with her at the time of the execution of the deed. Ms. Gunter's friend, Rosetta Simpson, testified that "[Mr. Brannum] would have a hard time surviving [without Ms. Gunter's assistance]." It is clear that the Decedent, due to his age and increasing difficulty with his health, was easily confused. This is particularly evident in the video excerpts of a conversation with the Decedent that were admitted as Exhibit 22 at the hearing. The testimony of Dr. Michael T. Cox, the Decedent's treating physician, corroborates this conclusion. Dr. Cox testified that the Decedent was prescribed anti-anxiety medication due, in large part, to his anxiety over the Brannums' lawsuit, and specifically his belief that the Brannums would take all of his property.

Ms. Gunter also argues that, because she offered to transfer the property back to the Decedent, she is not guilty of undue influence. Under the circumstances of this case, we disagree. Although the original scheme may have been to transfer the property out of the Decedent's name to save it from a perceived incumbrance arising from the Braunums' lawsuit, there is no indication that Ms. Gunter had any intention of transferring the property back to the Decedent, despite his wishes that she do so. Mr. Coleman testified, in relevant part:

> Q. Okay. At the time that you [Mr. Coleman] prepared the affidavit, had you heard Samuel C. Brannum ask his daughter to convey the property back to him?

A. I sure did.

Q. Did she refuse to do that?

A. Yes.

In fact, Ms. Gunter's refusal to transfer the subject property back to her father only supports the trial court's finding that she exercised undue influence in procuring the property for herself. Although we cannot go so far as to say that Ms. Gunter promised her father the return of his property as a ruse to cause him to transfer it to her in the first place, it is certainly a suspicious fact that Ms. Gunter has simply not overcome with her evidence. From the totality of the circumstance, we conclude that Ms. Gunter has failed to satisfy her burden of proof to rebut the presumption of undue influence in this case.

## Unclean Hands

Ms. Gunter further argues that the Decedent was guilty of unclean hands in the transfer of the property and, consequently, that his estate should not be allowed to set aside the transfer he made to Ms. Gunter. Specifically, Ms. Gunter contends that the Decedent transferred the property in an effort to keep it out of the reach of the Brannums in their lawsuit. In support of her argument, Ms. Gunter relies upon the maxim of equity "in pari delicto melior est conditio defendentis," which roughly translated means: where parties are equally in the wrong, the Defendant should prevail. However, the law is clear that the parties cannot be "in pari delicto" if the deed was brought about by the grantee exercising undue influence on the grantor. ***See, e.g., Copeland v. Long***, 41 S.W. 866, 872 (Tenn. Ch. App. 1896). In light of our finding that Ms. Gunter has failed to rebut the presumption of undue influence in this case, we are unable to find that she and the Decedent were "in pari delicto." The Decedent relied upon Ms. Gunter not only for his daily necessities, but also in his business affairs. Given these facts, coupled with the rather suspect circumstances surrounding the procurement of the deed and the lack of independent advice, we surmise that Ms. Gunter's hands are conceivably more soiled than those of her father. As discussed above, the Decedent was easily influenced due to his age and infirmity. It is a longstanding principle of our jurisprudence that, "[w]hen a person not non compos or insane is yet of such great weakness of mind as to be unable to guard himself against imposition, or to resist importunity or undue influence, he will be protected in the Court of Equity." ***Copeland***, 41 S.W. at 872.

## Subsequent Ratification

Ms. Gunter also contends that, even if the deed was procured under suspicious circumstances, the Decedent subsequently ratified the transfer. From our review of the record, we disagree. In the first instance, the alleged ratifications that Ms. Gunter relies upon for her argument were all made at a time when Ms. Gunter held her father's power of attorney. Consequently, these purported ratifications occurred at a time when the presumption of undue influence on the part of Ms. Gunter was in effect. More importantly, however, from the record it appears that the Decedent did not

attempt to ratify the transfer. Rather, it appears that he attempted to undo the transfer by asking Ms. Gunter to transfer the property back to him.

For the foregoing reasons, we affirm the order of the trial court. Costs of this appeal are assessed against the Appellant, Virginia Brannum Gunter, and her surety.

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J. STEVEN STAFFORD, J.